IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE THE MARRIAGE OF,	)	
	)	No. 62553-5-I
TINA R. NASH a/k/a TARVER,	)	
	)	
Appellant,	)	UNPUBLISHED OPINION
	)	
v.	)	
	)	
JAMES E. NASH,	)	
	)	FILED: June 1, 2009
Respondent.	)	

Schindler, C.J. — In this appeal, the parties dispute the meaning of the mediation agreement and a provision in the "Informed Consent Cryopreservation of Fertilized Eggs and/or Embryos" agreement (the cryopreservation agreement) that they signed. The trial court concluded that because the parties agreed the court would decide which party would have control over the frozen preembryos, the provision in the cryopreservation agreement that gave Tina Nash the authority to determine disposition of the preembryos did not apply.[1] Tina appeals the trial court's decision and entry of the "Order Relating to Embryos Stored at Reproductive Medicine Laboratory in Portland, Oregon" (Order Relating to Stored Embryos) giving James Nash control over

[1] The term "pre-embryo" refers to a fertilized egg. In re Marriage of Litowitz, 146 Wn.2d 514, 516, 48 P.2d 261 (2002).

the disposition of the preembryos.[2] Because the trial court did not err in interpreting the meaning of the mediation agreement and the cryopreservation agreement, we affirm and lift the stay.

Tina and James married on August 14, 2004. Tina has two teenage daughters from a previous marriage. Before marrying Tina, James made clear his strong desire to have children. James told Tina that if she did not want to have children with him, he would end the relationship.

After unsuccessfully trying to conceive, James and Tina consulted a fertility specialist. The doctor recommended in vitro fertilization (IVF). IVF involves injecting James's sperm into donor eggs. On March 4, 2005 Tina and James entered into an agreement for the IVF procedure with the Reproductive Medicine Laboratory in Portland, Oregon, "Informed Consent Cryopreservative of Fertilized Eggs and/or Embryos" (the cryopreservation agreement).

The cryopreservation agreement is a form agreement drafted by the Reproductive Medicine Laboratory. The agreement refers to Tina as the "Patient" and James as the "Spouse." James testified that the parties were not represented by an attorney and did not discuss any of the provisions of the cryopreservation agreement. James also testified that he did not read the cryopreservation agreement before signing it. James said that Tina signed the agreement first and initialed certain provisions, then gave him the agreement and told him to "initial here."

One section of the cryopreservation agreement addresses the disposition of any

[2] For clarity, Tina and James Nash are referred to by their first names.

remaining frozen preembryos in the event of the patient's death, the spouse's death, or divorce. The agreement states:

> In case of one of the circumstances listed below, we instruct the Reproductive Medicine Laboratory to conduct disposition of any and all remaining frozen embryos based on our current wishes. Our wishes regarding each of the following situations are indicated by our initials (Patient and Spouse must both initial the same choice).
>
> Patient's Death.
>
> /i/ /i/ Disposition of embryos to be determined by Spouse.
> ___ ____ Thaw and disposal of the embryos in any manner deemed appropriate by the Reproductive Medicine Laboratory.
>
> Spouse's Death.
>
> /i/ /i/ Disposition of embryos to be determined by the Patient.
> ___ ____ Thaw and disposal of the embryos in any manner deemed appropriate by the Reproductive Medicine Laboratory.
>
> Divorce (if not addressed in the divorce settlement)
>
> /i/ /i/ Disposition of embryos to be determined by Patient.
> ____ ___ Disposition of embryos to be determined by Spouse.
> ____ ___ Thaw and disposal of the embryos in any manner deemed appropriate by the Reproductive Medicine Laboratory.

Two months after signing the cryopreservation agreement, James and Tina entered into an agreement with an anonymous egg donor for the IVF procedure, "Agreement Regarding Reproductive Procedures Ovum Donor, Pre-embryo Transfer & Gestational Carrier" (the donor agreement). An attorney representing Tina and James drafted the donor agreement. The donor agreement provides that in the event of multiple preembryos from the IVF procedure, the preembryos would be preserved for future use and Tina and James would control disposition of the unused preembryos.

> Further, RECIPIENTS and DONOR agree that in the event there are multiple pre-embryos resulting from the procedures contemplated in this Agreement such that some or all of such pre-embryos are cryopreserved or otherwise preserved for any

> intended future procedures, that RECIPIENTS alone will direct, and/or have as of the date of this Agreement directed, their physician and clinic as to their desired use or disposition of such unused and preserved pre-embryos, provided, however, that DONOR requests that RECIPIENTS not donate, sell or otherwise transfer any donated ovum or resulting pre-embryos not personally used by RECIPIENTS to another person or couple (other than a gestational surrogate working with the RECIPIENTS) for the purpose of conception without the prior written consent of the DONOR.

The donor agreement also provides that the terms of the agreement are only effective for six months from the date of completion of the retrieval procedure:

> The terms of this Agreement shall begin with the execution date and end six (6) months from the date of completion of the Retrieval Procedure. Further, the parties agree that unless otherwise specifically agreed to between the parties, the retrieval procedure must occur, if at all, within 6 months of the date of the execution of this Agreement, provided however that it is acknowledged and agreed that DONOR is not available to undergo the procedure contemplated herein during the period between June 20, 2005 through and including July 1, 2005. The term set forth herein is not intended to abridge the Parties' rights and/or obligations hereunder which may extend beyond the six month period, including but not limited to, parental rights and responsibilities, confidentiality, financial responsibilities, indemnity agreements, waiver of claims and future contact.

The IVF procedure was successful. Approximately fourteen donor eggs were fertilized with sperm from James. Tina and James had two sons using the preembryos. H.N. was born in January, 2006 and T.N. was born in March, 2007. Four remaining preembryos are frozen and stored at the Reproductive Medicine Laboratory. The five year storage contract expires in 2010.[3] James testified that the entire procedure cost approximately $34,000.

[3] James testified that the storage facility is willing to store the preembryos indefinitely.

On November 7, 2007, Tina filed for dissolution of the marriage. In September 2008, Tina and James participated in mediation and resolved all issues except which party would have control over their oldest son's stem cells and the frozen preembryos stored with the laboratory in Oregon. The mediation agreement states:

> The issue of which party shall have control over the stem cells currently stored by Cord Blood Registry and the embryos stored with Oregon Reproductive Medicine shall be determined by Judge Douglass North at a trial on October 6, 2008 or another date set by the court.

The trial began before Judge Douglass North on October 9, 2008. Right before trial, the parties resolved a number of issues through arbitration, including control over the stem cells. The only issue at trial was which party would have control over the frozen preembryos.

Tina argued that the cryopreservation agreement gave her control over the preembryos and that the mediation agreement did not modify the terms of the cryopreservation agreement. Tina also argued that the provision in the donor agreement requesting Tina and James to "not donate, sell, or otherwise transfer any donated ovum or resulting pre-embryos not personally used by RECIPIENTS," showed that the parties intended to limit the use of the preembryos to Tina and James. Based on the plain language of the cryopreservation agreement, James asserted that Tina only had the authority to decide disposition of the preembryos if that issue was "not addressed in the divorce settlement" and that by agreeing in the mediation agreement that Judge North would decide who would control the disposition of the remaining frozen preembryos, the cryopreservation agreement did not control. James also

argued that the language in the donor agreement did not indicate the intent of James and Tina, and that in any event, the donor agreement expired six months after completion of the retrieval procedure.

The parties stipulated to the admission of the donor agreement, the cryopreservation agreement, the mediation agreement, and the parties' agreed Decree of Dissolution, Parenting Plan, and Order of Child Support. Tina and James were the only witnesses at the trial.

At the time of trial, Tina was fifty years old and James was fifty-three. Tina testified that she wanted the preembryos destroyed. James testified that because he had "never loved anything in my life as much as those two little boys," he "absolutely" wanted more children. James testified that he did not have plans to remarry but that he had explored the possibility of using a surrogate. James said that he would not engage in the IVF procedure again because of the high cost of the procedure and the uncertainty of success. James also testified that a "key part" of the agreement the parties reached at the mediation was that Judge North would decide which party would control the disposition of the remaining preembryos.

The court concluded that the plain language of the cryopreservation agreement gave Tina the right to determine the disposition of the preembryos but only if that issue was not "addressed in the divorce settlement." The court decided that because the issue of which party would control the preembryos was addressed in the mediation agreement by directing the court to decide, Tina did not have the right to determine the disposition of the preembryos. The court ruled that James was entitled to control the

disposition of the remaining frozen preembryos.

> When I take into account the themes that run through the cases here, I think that certainly the cases rely upon the parties' agreements to the extent that they are applicable. But I think in this case that [the cryopreservation agreement] isn't an agreement that is applicable because the applicable part of the agreement says, "If not addressed in the divorce settlement." And here it is addressed in the divorce settlement.
>
> I'm going to hold in favor of Dr. Nash. I think that the provisions, as I read it, of the contract are that, yes, the parties had specified that it was to be up to Ms. Tarver if not addressed in the divorce settlement. But I think that it is addressed in the divorce settlement. It's -- the parties argued for and agreed that it was going to be submitted to me.

The court's written findings of fact also state:

> 1. Embryos are stored with The Reproductive Medicine Laboratory in Portland, Oregon pursuant to a contract entered into by the parties on March 4, 2005. The embryos consist of respondent's husband's genetic material and a donor egg. Wife has no genetic material in the embryos.
> 2. The parties agreed in their 'divorce settlement' agreement following mediation that the court would decide the issue of which party has control over the embryos, and wife's alleged veto power under the March 2004 contract does not apply. No other agreements are applicable to resolve this dispute.
> 3. Husband utilizing the embryos to procreate would not force wife into becoming a biological parent against her will.
> 4. Husband wants the option of becoming a parent again. The husband's alternatives to achieve parenthood are not reasonable, as it would require him to restart the expensive process and the success of the process is questionable due to his age.

In the Order Relating to Stored Embryos, the court ruled that James "shall have 100% control over the embryos stored at the Reproductive Medicine Laboratory, Inc., Portland, Oregon pursuant to the [cryopreservation agreement] signed by the parties on March 4, 2005." The order also provides that "[n]o other person has any parental

obligations or rights related to the embryos" and James "does not have to seek permission from any other person for any use of the embryos. . . ." Tina filed an appeal and a motion to stay the Order Relating to Stored Embryos. A commissioner of this court granted the motion to stay and ordered accelerated review.

Tina and James dispute the meaning of the language of the cryopreservation agreement concerning disposition of the preembryos. Tina argues that the trial court erred in interpreting the language of the cryopreservation agreement by concluding that the mediation agreement invalidated Tina's right to determine the disposition of the preembryos.[4] James asserts that because the question of who would have control over the preembryos was addressed in the mediation agreement, Tina no longer had the right to determine disposition of the preembryos.

The construction of a contract and whether a contract is ambiguous is a legal question that we review de novo. Schwab v. Seattle, 64 Wn. App. 742, 751, 826 P.2d 1089 (1992). Our primary goal in interpreting a contract is to ascertain and effectuate the parties' intent. In re Marriage of Litowitz, 136 Wn.2d 514, 517, 48 P.3d 261 (2002). We determine the parties' intent "'by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties '" Berg v. Hudesman, 115 Wn.2d 657, 667, 510 P.2d 222 (1990) (quoting Stender v. Twin City

[4] For the first time on appeal, Tina also argues that James did not meet his burden of proving that Tina waived her rights under the cryopreservation agreement. This court need not address issues raised for the first time on appeal. RAP 2.5(a); see also Herberg v. Swartz, 89 Wn.2d 916, 925, 578 P.2d 17 (1978).

Foods, Inc., 82 Wn.2d 250, 254, 810 P.2d 221 (1973)).

We must focus on the objective manifestation of the parties in the written contract rather than the unexpressed subjective intent of either party. Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005). It is our duty to give meaning to every term. Stokes v. Polley, 145 Wn.2d 341, 346-47, 37 P.3d 1211 (2001). Words should be given their ordinary meaning which we may ascertained by reference to standard English dictionaries. Wm. Dickson Co v. Pierce County, 128 Wn. App. 488, 493, 116 P.3d 409 (2005). "A provision is not ambiguous merely because the parties suggest opposing meanings." Stranberg v. Lasz, 115 Wn. App. 396, 402, 63 P.3d 809 (2003) (quoting Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 421, 909 P.2d 1323 (1995)).

An agreement reached as the result of mediation is a legally binding settlement agreement. Haller v. Wallis, 89 Wn.2d 539, 573 P.2d 1302 (1978). Settlement agreements are governed by contract principles and "'subject to judicial interpretation in light of the language used and the circumstances surrounding their making.'" Sherrod ex rel. Cantone v. Kidd, 138 Wn. App. 73, 75, 155 P.3d 976 (2007) (quoting Stottlemyre v. Reed, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983)). In construing a settlement agreement, we must look to the language of the agreement. Hadley v. Cowan, 60 Wn. App. 433, 438, 804 P.2d 1271 (1991).

There is no dispute that Tina and James engaged in mediation in an effort to resolve a number of issues in the dissolution of their marriage. Before trial, the parties were able to resolve all issues except the disposition of the preembryos. In the

mediation agreements, the parties agreed that "The issue of which party shall have control over . . . the embryos stored with Oregon Reproductive Medicine shall be determined by Judge Douglass North at a trial on October 6, 2008 or another date set by the court."

The cryopreservation agreement states that Tina shall have the sole authority to decide disposition of the preembryos but only "if not addressed in the divorce settlement."[5] Under the plain language of the cryopreservation contract, we agree with the trial court's conclusion that because Tina and James "addressed" the question of disposition of the frozen preembryos in the mediation agreement, the cryopreservation agreement no longer controlled. Consequently, the court had the authority to determine which party would control disposition of the remaining frozen preembryos.

Relying on Kass v. Kass, 91 N.Y.2d 554, 696 N.E.2d 174 (1998), Tina argues that the disputed language in the cryopreservation agreement, "if not addressed in the divorce settlement," does not effect the provision giving Tina the right to determine the disposition of the preembryos. Tina's reliance on Kass is misplaced. In Kass, the parties executed several informed consent forms before undergoing IVF. In the informed consent forms, the parties agreed to relinquish control of their preembryos to the hospital for research purposes in the event of a dispute. Kass, 696 N.E.2d at 181. One informed consent form provided:

> In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. …" [i]n the event that we . . . are unable to make a

[5] Webster's II New Riverside Dictionary 10 (1984) defines "address" as "to speak to."

> decision regarding the disposition of our stored, frozen pre-zygotes …. [o]ur frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program."

Kass, 696 N.E.2d at 176-77. The parties in Kass also signed an "'uncontested divorce' agreement" indicating that their preembryos "should be disposed of [in] the manner outlined in our consent form and [neither party] will lay claim to custody of these pre-zygotes." Kass, 696 N.E.2d at 177.

The court in Kass concluded that according to the language in the informed consent forms, the parties agreed to donate their preembryos for IVF research in the event they could otherwise reach an agreement on disposition. The court interpreted the provision in the consent form as indicating that the parties' agreement would be part of the divorce documents and noted that the uncontested divorce agreement ratified their agreement in the informed consent forms. Kass, 696 N.E.2d at 181.

Tina's reliance on Litowitz is also misplaced. In Litowitz, the parties entered into a cryopreservation agreement that stated in part, "In the event we are unable to reach a mutual decision regarding the disposition of our pre-embryos, we must petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of our pre-embryos." Litowitz, 146 Wn.2d at 519. The cryopreservation agreement also stated that in the event one or more of the preembryos remained frozen and was not wanted or needed by the parties, they requested "That our pre-embryos be thawed but not allowed to undergo further development." Litowitz, 146 Wn.2d at 520. Because the parties could not agree on the disposition of the preembryos in the dissolution proceeding, they filed a petition asking the court to determine disposition of the

preembryos. Litowitz, 146 Wn.2d at 520. On appeal, the court held that the language of the cryopreservation agreement addressed disposition of the remaining preembryos by providing that the preembryos would be thawed and would not undergo further development. Litowitz, 146 Wn.2d at 533.

Here, unlike in Kass and Litowitz, the plain language in the cryopreservation agreement stating that Tina would have control over the preembryos only applies "if not addressed in the divorce settlement." Tina and James addressed the question of which party would have control over the remaining frozen preembryos in mediation by agreeing that the court would determine that question. We conclude that the trial court did not err in interpreting the mediation agreement and the cryopreservation agreement and ruling on the issue of which party would have control over the preembryos.[6]

For the first time on appeal, Tina asserts that the trial court exceeded its authority by prospectively terminating her rights to any child born using the frozen preembryos.[7] Tina relies on RCW 26.26.101(1)(d) and language in the donor agreement to argue that she has maternal rights in the preembryos.

RCW 26.26.101(1)(d) provides that a mother-child relationship is established by

[6] The other out-of-state cases Tina relies on are similarly distinguishable. See Roman v. Roman, 193 S.W.3d 40, 44 (2006) ("If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be . . . Discarded."); In re Marriage of Dahl and Angle, 222 Or. App. 572, 575, 194 P.3d 834 (2008) (rev. denied, 346 Or. 65, 204 P.3d 95 (2009) ("If the CLIENTS are unable or unwilling to execute a joint authorization, the CLIENTS hereby designate the following CLIENT or other representative to have the sole and exclusive right to authorize and direct UNIVERSITY to transfer or dispose of the Embryos, pursuant to the terms of this Agreement . . .").

[7] Tina concedes that she did not raise the argument below but asserts that she can raise the question of jurisdiction for the first time on appeal. RAP 2.5(a)(1) (a party may raise a claim of lack of court jurisdiction for the first time in the appellate court).

"a valid surrogate parentage contract." But RCW 26.26.725 expressly states that after the dissolution of marriage, Tina did not have any prospective parental rights to the preembryos. RCW 26.26.725(1) provides:

> If a marriage is dissolved before placement of eggs, sperm, or an embryo, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.

And as previously noted, the terms of the donor agreement expired six months after completion of the retrieval procedure.[8] We conclude that the trial court did not exceed its authority in ruling that Tina did not have any parental obligation or rights to the preembryos.

We affirm the decision of the trial court, the Order Relating to Stored Embryos, and lift the stay.

WE CONCUR:

[8] The donor agreement provides in part:

> The term of this Agreement shall begin with the execution date and end six (6) months from the date of completion of the Retrieval Procedure. . . . The term set forth herein is not intended to abridge the Parties' rights and/or obligations hereunder which may extend beyond the six month period, including but not limited to, parental rights and responsibilities . . . .